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Nos. 14-556, -562, -571, -574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners,*
v.
RICHARD HODGES, ET AL., *Respondents.*

VALERIA TANCO, ET AL., *Petitioners,*
v.
WILLIAM EDWARD "BILL" HASLAM, ET AL., *Respondents.*

APRIL DEBOER, ET AL., *Petitioners,*
v.
RICHARD SNYDER, ET AL., *Respondents.*

GREGORY BOURKE, ET AL., *Petitioners,*
v.
STEVE BESHEAR, ET AL., *Respondents.*

On Writs of Certiorari to the U.S. Court Of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, WILLIAM N. ESKRIDGE JR., AND STEVEN CALABRESI IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF AMICI CURIAE[1]

The Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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Amici's interest here case lies in enforcing the age-old principle of "equality under the law," as enshrined in the Constitution through the Fifth and Fourteenth Amendments.

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[1] Rule 37 statement: Letters of consent from all parties to the filing of this brief have been submitted to the Clerk (Petitioners' counsel consented specifically, while Respondents' counsel lodged a blanket consent). *Amici* further state that this brief was not authored in whole or in part by any party's counsel, and that no person or entity other than *amici* made a monetary contribution its preparation or submission.

SUMMARY OF ARGUMENT

The Fourteenth Amendment's Equal Protection Clause establishes a broad assurance of equality for all. It guarantees the same rights and same protection under the law for all men and women of any race, whether rich or poor, citizen or alien, gay or straight, *Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886), and "prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 31 (1883). The original meaning of the Clause "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), and "abolishes all class legislation in the States," *id.*, thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction." *Id.* at 2502.

Under the Fourteenth Amendment, no person may be relegated to the status of a pariah, "a stranger to [the State's] laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996). Nor may states deny to gay men or lesbians rights basic to "ordinary civic life in a free society" so as to "make them unequal to everyone else." *Id.* at 631, 635. The Equal Protection Clause clearly protects against state-sponsored discrimination, "withdraw[ing] from Government the power to degrade or demean." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

Ignoring the Fourteenth Amendment's text, its history, and this Court's precedents, the Sixth Circuit held that the Equal Protection Clause does not apply to state marriage laws because there is no evidence that "the people who adopted the Fourteenth Amendment understood it to require the

States to change the definition of marriage." *DeBoer v. Snyder*, 772 F.3d 388, 403 (6th Cir. 2014).

The lower court erred by focusing on a certain kind of original *understanding* (the immediate effect supporters "understood" the Fourteenth Amendment to have). This Court has rejected that approach to constitutional interpretation, focusing instead, on original *meaning*. *See, e.g., District of Columbia v. Heller,* 554 U.S. 570, 576-77 (2008). In the Fourteenth Amendment context, this Court has asked how the well-established meaning of terminology added to the Constitution in 1868 applies to modern exclusions of new as well as established social groups. *E.g., United States v. Virginia*, 518 U.S. 515, 557 (1996); *Romer*, 517 U.S. at 631-34.

As to what that original meaning is, this Court has held that the Equal Protection Clause secures to all persons and classes "'the protection of equal laws,'" *Romer*, 517 U.S. at 634 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)), and prohibits caste legislation that discriminates against a social class, "not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635.

Many equal-protection precedents are hard to explain as a matter of "original understanding" but are amply justified as an application of the equality-under-law principle. Robert Bork, *The Tempting of America: The Political Seduction of the Law* 75-77, 143-46 (1990) (making this point regarding the Court's desegregation precedents). The rule against class legislation applies with special force to the central institutions of state law, as this Court has repeatedly held in its marriage-equality precedents.

Windsor, 133 S. Ct. at 2693; *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*,, 388 U.S. 1, 9-10 (1967).

So while it may be true that no one alive at the time of the Fourteenth Amendment's ratification expected that its adoption would "require a state to license a marriage between two people of the same sex," evidence of prophetic anticipation on the part of that generation is not required before this Court can apply the Fourteenth Amendment to novel facts.

Laws can and must have consequences beyond those understood or anticipated by the generation of their promulgation. *Heller*, 554 U.S. at 582. As one prominent originalist scholar recently put it, original-meaning originalism "is entirely consistent with updating the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but actually required by the theory. Otherwise, it will often be impossible to enforce the original meaning under conditions different from those envisioned by the generation that framed and ratified the relevant provision." Ilya Somin, *William Eskridge on Originalism and Same-Sex Marriage*, Volokh Conspiracy, Wash. Post, Jan. 23, 2015, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage.

In other words, just as a "19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part & dissenting in part), a 19th-century constitutional command that no state

may "deny to any person within its jurisdiction the equal protection of the laws" is not ambiguous in its application to sweeping exclusions in state family law. The civil recognition of marriage is a matter of law and the Petitioners are clearly "person[s] within [the states'] jurisdiction" who have been denied myriad legal benefits and protections solely on account of their sexual orientation. This is the very kind of class-based discrimination that the Equal Protection Clause prohibits, and it falls now to this Court to fulfill the Fourteenth Amendment's promise of equal liberty for all Americans.

ARGUMENT

I. THE FOURTEENTH AMENDMENT PROHIBITS LAWS THAT VIOLATE THE PRINCIPLE OF "EQUALITY UNDER LAW" BY CREATING A LEGALLY INFERIOR CLASS OF CITIZENS

An analysis of the history and origins of the Fourteenth Amendment shows that a principal purpose and consequence of the Equal Protection Clause's adoption was to deny states the power to pass "caste" legislation creating classes of legally inferior persons based on arbitrary characteristics such as race, color, creed, or orientation.

Some have argued that, because it was one of the Reconstruction Amendments, the Fourteenth Amendment's original meaning ought to be understood narrowly as a response to slavery, meant only to prohibit laws "designed to assert the separateness and superiority of the white race." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 88 (2012), or,

somewhat more generously, to prohibit those forms of discrimination to which "the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race." *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting.)

This narrow, race-based view of the Fourteenth Amendment flouts the broad text of the Equal Protection Clause and ignores a wealth of readily available historical evidence. In particular, a constitutional right to equal protection existed in the states long before 1868. Moreover, the narrow reading cannot account for the ratifying Congress's explicit rejection of drafts that would have limited the Fourteenth Amendment to protecting former slaves, or this Court's long and proper practice of relying on the Fourteenth Amendment to end state discrimination targeting groups identified by something other than the color of their skin.

A. AMERICANS FOUGHT FOR EQUAL PROTECTION LONG BEFORE THEY FOUGHT A WAR AGAINST SLAVERY

One of the bedrock principles of colonial and Founding Era constitutional theory was that the rule of law carries with it a presumption of general and equal application. Calabresi & Begley, *Originalism and Same-Sex Marriage*, *supra*; Rebecca L. Brown, Liberty, *The New Equality*, 77 N.Y.U. L. Rev. 1491, 1512-20 (2002). As the Preamble to the Pennsylvania Constitution of 1776 put it, government is legitimately established "for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights . . . without partiality for, or prejudice against,

any particular class, sect, or denomination of men." Because all people are born "equally free and independent," Va. Decl. of Rights § 1 (1776), they "ought forever to enjoy equal rights and privileges." Del. Decl. of Rights § 3 (1776). The Declaration of Independence proclaimed that America's constitutional democracy is premised upon the notion that "all Men are created equal." Decl. of Independence ¶ 2 (1776).[2]

These Revolutionary Era documents had a significant influence on the U.S. Constitution long before John Bingham's appointment to the Joint Committee on Reconstruction. The Framers assumed that "equality . . . ought to be the basis of every law" and that the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785). The Constitution created a governmental structure that would protect "particular classes of citizens" against "unjust and partial laws," *The Federalist* No. 78 (Alexander Hamilton), imposed by majority "faction[s]," *The Federalist* No. 10 (James Madison).

To ensure ratification, the founding generation added a bill of rights in 1791. Tracking the Virginia Declaration, the Bill of Rights implemented the principles of generality and equal treatment through specific protections for property owners in the Takings Clause of the Fifth Amendment and for

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[2] Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63, 63-65 (1989).

religious minorities in the First Amendment's Religion Clauses.[3] Echoing the states' common-benefits clauses, the Due Process Clause of the Fifth Amendment reflected the generality principle and, implicitly, the equality baseline as well. *E.g.*, *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (argument of Daniel Webster, accepted by the Court); *see* Rodney L. Mott, *Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by the Courts in the Application of the Concept of the "Law of the Land"* 256-74 (1926); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 251-68 (1997).

Judges vigorously applied these constitutional rules against "class legislation." For example, in *Reed v. Wright*, 2 Greene 15 (Iowa 1849), the Iowa Supreme Court struck down a statute making it easier for the state to question land claims owned by so-called "half breeds":

> Laws affecting life, liberty, and property must be general in their application, operating on the entire community alike. It is the boast and pride of our institutions that we have no favored classes; no person so high that he does not require the care and protection of the law, no person so low as not to be entitled to them.

Id. at 27-28. *See also Crow v. State*, 14 Mo. 237, 281-83 (1851); *Goepp v. Bethlehem Borough*, 28 Pa. 249, 255 (1857); *Budd v. State*, 22 Tenn. 483, 491-92

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[3] Fears of unequal treatment, through special privileges or exclusions, were focused in this period on religious minorities. *E.g.*, S.C. Const.,1778, art. XXXVIII.

(1842); Steven G. Calabresi, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J. L. Pub. Pol'y 983 (2013).

An important statement of the rule against class legislation came from President Andrew Jackson. In a veto message delivered in 1832, President Jackson announced that "every man is equally entitled to protection by law." He continued: "If [law] would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing." Andrew Jackson, Veto Report (July 10, 1832), *in* 2 *A Compilation of the Messages and Papers of the Presidents: 1789-1897*, at 590 (James D. Richardson ed., 1896).

As new states entered the Union, they adopted explicit constitutional protections against class legislation, characteristically deploying the language of equality. Typical was the provision of Iowa Constitution of 1857, reflecting the broad protections earlier announced in *Reed v. Wright*: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const., 1857, art. I, § 6; *accord*, Ind. Const., 1851, art. I, § 23; Or. Const., 1857, art. I, § 20; Wis. Const., 1848, art. I, § 1. The Ohio Constitution of 1851 explicitly guaranteed all citizens the "equal protection" of the law. Ohio Const., 1851, art. I, § 2.

Litigants and judges invoked these common-benefit and equal-protection clauses in challenges to legislation that created special privileges for political

insiders or targeted "odious individuals or corporate bodies" with special legal burdens. *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 555-57 (1831). As *Reed v. Wright* illustrates, some Jacksonians and "Conscience" Whigs believed that laws discriminating against racial minorities could be questionable "class" legislation. In the 1850s, a new generation of anti-slavery constitutionalists applied the "equal protection" idea to challenge slavery and laws entrenching racial or ethnic "castes." Jonathan H. Earle, *Jacksonian Anti-Slavery & the Politics of Free Soil, 1824-1854* (2004). Consider the most important explication of this new attitude toward class legislation and equal protection of the law, its application to segregated schools.

In 1849, abolitionist Charles Sumner explained this expansive norm against class or caste legislation in his argument against public school racial segregation before the Massachusetts Supreme Judicial Court in *Roberts v. City of Boston*, 59 Mass. 198 (1849). Applying the provision recognizing the presumptive equality of all citizens in the Massachusetts Constitution, Sumner said this:

> Within the sphere of their influence no person can be *created*, no person can be *born* with civil or political privileges not enjoyed equally by all his fellow-citizens; nor can any institution be established recognizing any distinction of birth. Here is the Great Charter of every human being drawing the vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black; he may be of Caucasian, Jewish, Indian, or Ethiopian race;

> he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black nor is he Caucasian, Jew, Indian, or Ethiopian nor is he French, German, English, or Irish; he is a Man, the equal of all his fellow men. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties, according to higher capacities, but it welcomes all to its equal, hospitable board.

Charles Sumner, *Equality before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*. Argument of Charles Sumner, Esq., Before the Supreme Court of Massachusetts In The Case of *Sarah C. Roberts v. City of Boston* 7 (Washington: F. & J. Rives & Geo. A. Bailey, 1870) (emphasis in the original).[4] Arguing that the division of schoolchildren by race is inherently a violation of equality, Sumner articulated a broad understanding of the rule against class legislation that included exclusions based on ethnicity, religion, income, or physiological traits. *Id.* at 7, 9-10, 13.

Sumner was not the only member of the antebellum legal community to urge a broad application of the principle against class legislation. In *Van Camp v. Board of Education*, 9 Ohio St. 406 (1859), the Ohio Supreme Court applied the state's

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[4] For a summary of Sumner's argument, emphasizing that the school's "caste" regime was a "violation of equality," see *Roberts*, 59 Mass. at 201-04.

equal protection clause to school segregation. In an opinion that used the terms "class" and "caste" legislation interchangeably, the court allowed school segregation—over the sharp dissent of Justice Milton Sutliff, whose broad understanding of class legislation included laws based on supposed "difference in races, religion, language, color, or any physiological peculiarities." *Id.* at 415-16.

Contemporary authors explained what judges and advocates meant by class legislation—and theirs was a broad reading of equality. "Under a system of caste, personal liberty and the right of property are controlled by laws restraining the activity of a class of persons, more or less strictly defined, to a particular course of life, and allowing only a limited enjoyment of property and relative rights." John C. Hurd, *Topics of Jurisprudence Connected with Conditions of Freedom and Bondage* 44 (1856); *accord, Wally's Heirs*, 10 Tenn. (2 Yer.) at 555-57.

B. REFLECTING THE NATION'S HISTORIC AVERSION TO CLASS LEGISLATION, THE EQUAL PROTECTION CLAUSE HAS BROAD APPLICATION AND IS NOT LIMITED TO RACE

It cannot be denied that Sumner and Sutliff's broad view of equal protection clauses was not the majority position in the 1850s. But the Civil War vindicated them, confirming "that this government is of and for the people with no privileged classes." Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism," A Reconsideration*, 53 J. Am. Hist. 751, 767 (1967) (quoting an oration by Thomas Cooley delivered in Detroit, July 1865). Views that were once attributed to fringe figures were now

decidedly mainstream. Clear evidence of this shift can be found by comparing the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, with Section 1 of the Fourteenth Amendment, ratified just two years later. The 1866 Act, aimed at the "Black Codes" that arose in the South immediately after the Civil War, sought to afford "citizens of the United States . . . of every race and color" the same rights and benefits as enjoyed "by white citizens." Seeking to constitutionalize those guarantees and to do so more broadly, Section 1 abandoned that express racial language in favor of simply "citizens" (Privileges or Immunities Clause) and "persons" (Due Process and Equal Protection Clauses). Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 Temp. L. Rev. 361, 383-92 (1993).

An important purpose of the Fourteenth Amendment was to provide a firm basis for congressional and federal judicial policing of state efforts to entrench social groups as inferior castes. *See* Report of the Joint Committee on Reconstruction xvii (1866), discussed in *McDonald v. City of Chicago*, 561 U.S. 742, 772-80 (2010); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1437-63. Although freed slaves were the obvious object of the rule against class legislation, Congress refused to limit the Equal Protection Clause to legislation discriminating against racial classes. Indeed, the Joint Committee that drafted the Fourteenth Amendment specifically rejected proposals to limit the equality guarantee to race-based classifications. Benjamin B. Kendrick, *The Journal of the Joint*

Committee of Fifteen on Reconstruction 46, 50, 83, 90-91, 97-100 (1914); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 Geo. L.J. 329, 399-400 (2011).

Thus, the text of the Equal Protection Clause encoded the precepts Sumner and other abolitionists had advanced as a broad rule against legislation that arbitrarily discriminated against whole classes of people. Indeed, a majority of state constitutions explicitly encoded a broad equal treatment norm as well. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 94-96 (2008).

Contemporaries explained the meaning of the Equal Protection Clause in precisely this way. Introducing the Fourteenth Amendment, Senator Jacob Howard said that the Equal Protection Clause "establishes equality before the law, and . . . gives to the humblest, the poorest, and most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." The clause plainly "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard); *see id.* at 2961 (Sen. Poland) (similar). House Speaker Thaddeus Stevens explained that the public meaning of the clause was that "the law which operates upon one

man shall operate *equally* upon all." *Id.* at 2459 (emphasis in the original).

Senator Howard's speech was widely reported in newspapers all over the country and was discussed among the citizenry. Kurt T. Lash, *Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1299-1300 (2013); *accord*, *McDonald*, 561 U.S. at 832-33 (Thomas, J., concurring). Typical was the coverage in the *Cincinnati Commercial*, which said this amendment would place "[everybody] throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation." It predicted that once the amendment took effect "it [would] be impossible for any Legislature to enact special codes for one class of citizens." *The Constitutional Amendment*, Cincinnati Commercial, Aug. 20, 1866, at 2, 4.[5] In the press coverage and in the state ratifying conventions, there was overwhelming support for the understanding that the meaning of "equal protection" was the broad rule against class/caste legislation similar to that articulated by Charles Sumner in 1849. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 67, 73, 79 (1988); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 35-42 (2011).

This view of the original meaning is confirmed by contemporary commentators, notably including Michigan Supreme Court Justice Thomas Cooley,

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[5] For discussion of this newspaper article, see Saunders. *Equal Protection, Class Legislation*, 96 Mich. L. Rev. at 288.

who authored and edited the leading constitutional law treatises of his era. Cooley explained the Fourteenth Amendment as nationalizing the anti-class legislation principle and expanding it to include racial and other forms of caste legislation. 2 Joseph Story, *Commentaries on the Constitution of the United States* 676-77, 684-85 (Thomas M. Cooley ed., 4th ed. 1873). Summarizing his view of the rule against class legislation, Cooley wrote in 1868:

> [A] statute would not be constitutional which should proscribe a class or party for opinion's sake, or which should [identify] particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. . . . Special privileges are obnoxious, and discriminations against persons or classes are still more so . . . .

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 390-91, 393 (1868).

The Fourteenth Amendment generally codified and expanded on the rule against class legislation and reaffirmed that ours is a "government whose fundamental idea is the equality of all citizens." 2 Story, *Commentaries*, 677. Cooley also explained the limit of the rule against class legislation. Thus, "there may be discriminations between classes of persons where reasons exist which make them necessary or advisable," such as laws establishing an age of majority and barring minors from entering into contracts—"but no one would undertake to

defend upon constitutional grounds an enactment that, of the persons reaching that age, those possessing certain physical characteristics, in no way affecting their capacity or fitness for general business or impairing their usefulness as citizens, should remain in a condition of permanent disability." *Id.* at 676-77; *accord,* Cooley, *Treatise,* 393 (pre-Civil War class legislation doctrine).

II. RESPONDENTS HAVE CREATED A LEGAL REGIME GRATUITOUSLY TREATING GAY AND LESBIAN AMERICANS (AND THEIR CHILDREN) AS AN INFERIOR CLASS, VIOLATING THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment's hostility to class legislation extends beyond laws creating racial castes, especially when important or fundamental rights such as marriage are at stake. *Zablocki*, 434 U.S. at 390-91 (striking down a law preventing remarriage for persons in arrears for alimony). *Cf. Turner*, 482 U.S. at 96-99 (striking down a broad state rule barring prisoners from marrying as an "exaggerated response" to "legitimate security concerns").

The equal-protection case against the exclusionary family law regimes here is stronger than the claims in *Zablocki* and *Turner,* because the exclusions at issue here are new expressions of anti-gay attitudes that dominated American public law in the 20th century. While the restrictions in *Zablocki* and *Turner* could be read at least as attempts to serve noble purposes—encouraging the payment of child support and protecting visitors to prisons,

respectively—denials of marriage licenses to same-sex couples only marginalize and denigrate.

In 1868, there was no class of "gay people" who could be targets of a caste regime; in this country, the "concept of the homosexual as a distinct category of person" emerged only at the end of the 19th century. *Lawrence v. Texas,* 539 U.S. 558, 568 (2003). After 1900, however, states adopted laws and policies marking "homosexuals and other sex perverts" (favored terms of the era) as a class of "odious individuals." *Wally's Heirs,* 10 Tenn. (2 Yer.) at 555-57. The result was a legal system that defined "homosexuals" as a pariah class outside the general benefits and protections of the laws.[6] To illustrate this caste regime, *amici* use Michigan as our focus, with parallel references to Kentucky, Ohio, and Tennessee—although our arguments extend uniformly to the laws of all states that deny marriage rights to lesbian and gay couples.

Michigan long had a sodomy law prohibiting anal intercourse between adults (or with children and animals), but once alerted to the presence of gender-bending "homosexuals" in the state, its legislators created new crimes of "gross indecency" (oral sex) between two adults of the same gender. 1903 Mich. Pub. Acts 108 (males); 1939 Mich. Pub. Acts 148 (females).[7] The legislature created a separate crime

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[6] William N. Eskridge Jr., *Dishonorable Passions: Sodomy Law in America, 1861-2003,* at 73-108 (2008); Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960,* 74 J. Am. Hist. 83-106 (1987).

[7] "Gross indecency" was the crime for which Oscar Wilde was convicted in 1895, and Alan Turing in 1952. Michigan later added a gross indecency crime for heterosexual couples.

for soliciting "immoral acts" from consenting adults. 1931 Mich. Pub. Acts 328, § 448.[8] As amended, the Michigan consensual sodomy and gross indecency laws provide for a prison term of up to 15 (sodomy) or 5 (gross indecency) years or, if the defendant is "sexually delinquent," a life sentence. Mich. Penal Code §§ 750.158, 750.338-338a (current codification).[9] Detroit had its own sex crime code, including a prohibition of public cross-dressing. Detroit Code § 39-1-35 (1944).

On top of these criminal sanctions, Michigan created a regime for civilly committing people convicted of sex offences who "appear to be psychopathic, or a sex degenerate" or a "sex pervert." 1935 Mich. Pub. Acts 87-88, 141.[10] Such "perverts" could be committed for an indeterminate time in a state mental hospital and, possibly, sterilized. 1929 Mich. Pub. Acts 281 (authorizing the sterilization of incarcerated "moral degenerates and sexual perverts"). *See generally* Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* 30 (2009).

Kentucky and Tennessee made oral sex a crime only if participants were of the same gender 1974 Ky. Acts ch. 406, § 90; 1989 Tenn. P.A. ch. 591, § 39-13-510.

[8] For similar laws targeting "deviate" intercourse, *see* 1974 Ky. Acts ch. 36; 129 Ohio Laws 1670 (1961).

[9] For a state-by-state survey of penalties for violating consensual sodomy laws, *see* J. Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the* Solem v. Helm *Test*, 56 U. Chi. L. Rev. 367, 379-88 (1989).

[10] For similar sexual psychopath commitment laws, *see* 118 Ohio Laws 686 (1939) (expanded in 1945 and 1951) and 1957 Tenn. Pub. Acts ch. 288.

Michigan authorities harassed, arrested, and sometimes imprisoned gay people, including juveniles, under authority of the foregoing laws. *E.g.*, Governor's Study Comm'n on the Deviated Criminal Sex Offender, *Report* 104 (Mich. 1951) (detailing the extensive enforcement of Michigan's penal laws against "sexual deviates," including juveniles); Univ. Mich. Lib., *Michigan's LGBT Heritage* (1999), available at http://www.lib.umich.edu/ online-exhibits/exhibits/show/lgbtheritage (viewed Feb. 25, 2015) (setting forth a timeline of events, including police raids, 1950s-1990s). Even without a criminal prosecution, however, the "homosexual" was a presumptive outlaw, subject to losing professional licenses or employment, especially in the education field. *E.g.*, *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984) (holding it permissible to fire a guidance counselor because she was bisexual).[11] Witch hunts drove suspected "homosexuals" from federal and state civil service positions. David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (2004). Such persons could not serve in the armed forces or in local police departments and, if they were immigrants, might be deported. *See* Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999).

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[11] *See also* Brett Beemyn, ed., *Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Communities* 174-75 (1997) (Detroit lesbians lived in fear of losing their jobs); Christine Yared, *Where Are the Civil Rights Protections for Gay and Lesbian Teachers?*, 24 Hum. Rts. 22-24 (Summer 1997).

Those who dared associate with "homosexuals" for social purposes could expect police or regulatory surveillance and harassment. Eskridge, *Gaylaw*, 74-76; George Chauncey Jr., *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940*, at 131-50, 331-51 (1994). In 1948, for example, Michigan's Liquor Control Commission informed bars that they would lose their liquor licenses if they served "homosexuals." Mich. Liquor Comm'n, Admin. Rule 436-3 (1948), (discussed in Bérubé, *Coming Out Under Fire*, 356 n.21.)

Indeed, the anti-gay caste regime created in the 20th century often denied lesbian and gay parents custody of—and sometimes barred visitation with—their own biological children. *E.g.*, *Hall v. Hall*, 95 Mich. App. 614, 615 (1980) (per curiam) (custody); *Roberts v. Roberts*, 489 N.E.2d 1067 (Ohio App.1985) (visitation). *Accord*, *S. v. S.*, 608 S.W.2d 64, 65 (Ky. Ct. App. 1980) (custody); *Black v. Black*, 1988 WL 22823 (Tenn. App. 1988) (custody). *See generally* Rhonda Rivera, *Our Straight-Laced Judges: Twenty Years Later*, 50 Hastings L.J. 1179, 1194-97 (1999). The reasoning was that exposure to a lesbian or gay parent would be destructive for the child. *E.g.*, *J.P. v. P.W.*, 772 S.W.2d 786, 792-94 (Mo. Ct. App. 1989) (citing cases); *see also* Clifford J. Rossky, *Fear of the Queer Child*, 61 Buff. L. Rev. 607, 630-31 (2012).

By 1950, gays and lesbians were an identifiable social class—indeed, an outlaw class of presumptive sex criminals. Although this Court invalidated consensual sodomy and gross indecency laws in *Lawrence*, the stigma of longtime state disapproval persisted. Notwithstanding *Lawrence*, Michigan's laws criminalizing consensual sodomy (§ 750.158)

and gross indecency (§§ 750.338-338a) remain on the statute books.[12]

Instead of repealing its decades-old anti-gay laws, Michigan has *expanded* its caste regime in recent years. Thus, the legislature amended its marriage code to exclude lesbian and gay marriages, to promote the "welfare of society and its children," 1996 Mich. Pub. Acts 324 (codified at Mich. Comp. Laws § 551.1), even though thousands of Michigan children would benefit from the marriage of their gay parents. In 2004, acting for the benefit of "future generations of children," voters amended the state constitution to assure that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

In 2008, the Michigan Supreme Court applied this sweeping bar to deprive lesbian and gay municipal employees of health insurance and other contract-based benefits. *National Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008). After some cities and the state's civil service commission created a new category of "other qualified persons" eligible for employment benefits

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[12] In 1990, a Michigan trial court declared such laws invalid in Wayne County, but that ruling did not apply statewide. *See Michigan Org. for Hum. Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990). Ohio repealed its consensual sodomy law in 1972. Ohio Laws 1906-11. The Kentucky and Tennessee homosexual sodomy laws were invalidated in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) and *Campbell v. Sundquist*, 926 S.W.2d 260 (Tenn. App. 1996), respectively. All four Sixth Circuit states retained their anti-solicitation laws, though Ohio's law was invalidated in *State v. Thompson*, 767 N.E. 2d 251 (Ohio 2002).

without seeming to recognize a "similar union" for gay couples, the legislature overrode those humane efforts in the Public Employee Domestic Partner Benefit Restriction Act, 2011 Mich. Pub. Acts 297, a discrimination found to be unconstitutional class legislation in *Bassett v. Snyder*, 2014 WL 5847607 (E.D. Mich. Nov. 12, 2014).

Michigan's treatment of lesbian and gay families today is unprecedented in that state's family law. Reflecting the perseverance of anti-gay sentiment in that state, Michigan's legal system continues to marginalize and denigrate lesbian and gay families, setting them apart from virtually all other families. (The same is true for Kentucky, Ohio, and Tennessee.) This is not the "equal liberty" entailed by the original meaning of the Fourteenth Amendment.

Original meaning suggests another objectionable feature to these exclusionary regimes. Enforcing the Fourteenth Amendment's rule against class legislation, this Court has repeatedly struck down discriminatory state policies that visit the consequences of public disapproval of parental conduct upon the lives of their children. *E.g.*, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173-76 (1972) (state channeling of procreating couples into marriage does not justify denial of state benefits to non-marital children); *Plyler v. Doe*, 457 U.S. 202, 218-20 (1982) (state channeling of noncitizens into legal immigration processes does not justify creation of an "underclass" of undocumented immigrants' children denied state education benefits). In *Windsor*, this Court relied on the "demean[ed]" status of children as a reason to be skeptical of

DOMA's broad exclusion of married lesbian and gay couples from federal benefits. 133 S.Ct. at 2694.

Several thousand children are presently being raised in lesbian and gay households in Kentucky, Michigan, Ohio, and Tennessee. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D. Mich. 2013). Because their parents cannot marry and cannot adopt these children as couples, the children risk devastating instability in the event that their legal parents die or are incapacitated. *Id.* at 763-64. Moreover, these Respondent-States argue that a marital household provides a more stable, nurturing environment for children even as they deny that advantage to children raised by lesbian and gay couples. Even as the Respondent-States do not contest the right of such couples to *adopt* children, they deny them the ability to raise those children in marital households.

III. STATE JUSTIFICATIONS FOR THEIR EXCLUSIONARY MARRIAGE LAWS CONFLICT WITH EQUAL PROTECTION AND ITS BAR TO CLASS LEGISLATION

The close connection between the 20th-century laws ostracizing gays and lesbians and the family-law regimes at issue in the cases here raises grave doubts regarding whether the exclusion of same-sex couples comports with the demands of the Equal Protection Clause. Although the original meaning of "equal protection" allows states to justify exclusions based on public need, the justifications offered now by the Respondents make clear that their distinctions between opposite-sex and same-sex couples do not serve any legitimate interest and are

instead founded on the core stereotypes that have underwritten the past century's anti-gay legislation.

A. RESPONDENTS' EXCLUSIONARY LAWS ADVANCE NO LEGITIMATE PUBLIC INTEREST

According to the court below, the goal of state marriage laws is to channel sexually active straight couples into "stable relationships within which children may flourish." *DeBoer*, 772 F.3d at 404-05. Conceding that the Respondents issue marriage licenses to non-procreating straight couples, the court opined that the statutory schemes were only a bit "underinclusive," which did not make them problematic under ordinary rational basis review. *Id.* at 405. There are a few problems with this analysis.

For one thing, the Sixth Circuit mischaracterized the state family-law regimes at issue in these cases. For the Respondents, the purpose of civil marriage is to provide structure for committed relationships and families. *DeBoer*, 772 F.3d at 405, a purpose fully applicable to lesbian and gay couples. Respondent-States issue marriage licenses to non-procreative heterosexual (including older) couples, allow spouses to have children with the aid of reproductive technologies that avoids intercourse, and encourage married couples to adopt children. *DeBoer*, 772 F. Supp. 2d at 764-65. If channeling procreative couples into marriage is the purpose of these states' family laws, the laws are both *over*-inclusive (sanctioning many relationships that evade this goal) and *under*-inclusive (ignoring lesbian and gay couples who do have children). The precise discrimination here "is at once too narrow and too broad" to find justification in this rationale. *Romer*, 517 U.S. at 633.

Moreover, the Sixth Circuit's narrative is incomplete. By its account, lesbian and gay couples have been "left behind" because the Respondent-States have just not gotten around to updating their marriage laws. The court below conceded the "costs to the plaintiffs of allowing the States to work through this profound policy debate," but urged, from a "Burkean sense of caution," that courts should allow "state democratic forces" to solve the problems caused by the state's own longstanding anti-gay caste regime when "evolving community mores show they should be fixed." *DeBoer*, 772 F.3d at 406-07.

This is not a case, however, where the Respondent-States have simply been slower than others in extending the protection of the law to gay couples. Instead, each state has gone out of its way to *further* exclude lesbian and gay couples from family law; three of the states have even updated their constitutions to bar non-marital forms of institutional recognition of gay families—an unprecedented exclusion in U.S. family law. Remarkably, Michigan has repeatedly denied lesbian and gay employees basic *contract* rights to partner benefits taken for granted by married straight employees. How does acting to deny a basic contract rights reflect a "Burkean sense of caution"?

By asking only whether a discriminatory law meets the needs of *some* citizens—and refusing to consider whether the discrimination itself advances legitimate state goals—the lower court's analysis defies this Court's precedents.

In *Romer*, Colorado justified its exclusion of gay citizens from anti-discrimination laws as a means of conserving enforcement resources by limiting those

laws to traits courts found to be "suspect classifications." Brief for Petitioner, at 41-43, *Romer*, 517 U.S. 620 (No. 94-1039). Because the main focus of anti-discrimination law has been to protect racial minorities, the state argued that those laws might be limited to their core protection and that the Equal Protection Clause tolerates this sort of under-inclusion. This Court rejected that argument, *Romer*, 517 U.S. at 635, and properly so, because the inquiry suggested by original meaning is not whether a government program (like marriage) serves the needs of the majority, but whether including the excluded minority would undermine the program's goals. 2 Story, *Commentaries*, 706 (quoted above).

In *Windsor*, this Court likewise considered and rejected the closely related argument (also offered by the states here) that excluding same-sex couples from marriage licenses is permissible because the focus of family law is to steer potentially procreative relationships into stable long-term marriages. *See* Brief for Respondent the Bipartisan Legal Advisory Group, at 44-47, *Windsor*, 133 S.Ct. 2675 (No. 12-307), making this argument, which was rejected by this Court in *Windsor*, 133 S. Ct. at 2694; *see id.* at 2709-10 (Scalia, J., dissenting) (observing that the Court's reasoning is applicable to state exclusions); *id.* at 2718 (Alito, J., dissenting) (arguing that this argument justified DOMA's discrimination). Consistent with original meaning, *Windsor* demanded that DOMA's defenders demonstrate how the *exclusion* of lesbian and gay couples *advanced* the public interest in civil marriage.

After years of trying, no state has made any kind of plausible showing along these lines. *See Baskin v.*

Bogan, 766 F.3d 648, 659-64 (7th Cir. 2014) (Posner, J.); *DeBoer*, 772 F.3d at 422-23 (Daughtery, J., dissenting). Indeed, in the course of this litigation, the district court found, as a matter of fact, that the state policy underlying civil marriage—encouraging stable parental relationships that benefit children—would be *advanced* (and not undermined) by including lesbian and gay couples, *DeBoer*, 973 F. Supp. 2d at 761-65, 770-72, a point conceded by the court of appeals. *DeBoer*, 772 F.3d at 405.

There are larger problems with the "irresponsible procreation" justification for marriage bans, especially in combination with other justifications, such as Michigan's argument that the state can discriminate against committed lesbian and gay couples because "it is beneficial for children to be raised by both a mom and a dad," Resp. Brief in Support of Petition, at 27-28, *DeBoer v. Snyder*, 2014 WL 6706856 (U.S. Nov. 24, 2014) (No. 14-571). Insofar as that proposition is read to imply that it harms children to be raised by a same-sex couple—especially compared to being raised by a single parent or in foster care—it was thoroughly discredited by the district court. *DeBoer*, 973 F. Supp. 2d at 770-72. There is no evidence that being raised by two parents of the same sex is inherently harmful, and this nation's doctors and scientists have been saying this with a unified voice for over a decade. *See, e.g.*, Brief of the American Psychological Association et al. as *Amici Curiae*, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (No. 12-144).

Homosexuality is not a disease and a parent's sexual orientation has no bearing on his or her

ability to raise a child. Nor at this point can any attorney contend otherwise before any court.

B. THESE LAWS CAUSE GREAT PERSONAL AND CONSTITUTIONAL HARMS BY PERPETUATING UNFAIR NEGATIVE STEREOTYPES

The legal regime establishing gay people as a lesser class was created in an era of increasing anxiety about new expressions of sexuality and new patterns of family formation. *See, e.g.*, Eskridge, *Dishonorable Passions*, *supra* note 6, at 76-84; Freedman, *"Uncontrolled Desires,"* *supra* note 6, at 89. The sentiment that justified systemic discrimination was the view that "homosexuals" are selfish because of their abandonment of "natural" gender roles and thus are "promiscuous recruiters and corrupters of children, who cannot have committed relationships" and families." *See, e.g.*, Angela Simon, *The Relationship Between Stereotypes and Attitudes Toward Lesbians and Gays*, in *Stigma and Sexual Orientation* 62-63 (Gregory Herek, ed., 1998). In an early example, the Navy warned recruits: "By [homosexual] conduct, a Navy woman may ruin her chances for a happy marriage" and poison relationships with her family. Chaplain's Presentation (WAVE Recruits), in *Indoctrination of WAVE Recruits on Subject of Homosexuality* (Nov. 1952); *see* Allan Bérubé & John D'Emilio, *The Military and Lesbians During the McCarthy Years*, 9 Signs 759-75 (1984) (reproducing this and other "indoctrination and education" materials).

For decades, the prevailing accepted wisdom was that, rather than contribute to families and communities, "homosexuals have an insatiable

appetite for sexual activities and find special gratification in the recruitment to their ranks of youth." Florida Legislative Investigation Comm'n, *Homosexuality and Citizenship in Florida* 10 (1964).[13] Congress endorsed this stereotype: "[P]erverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true of young and impressionable people who come under the influence of a pervert." *Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 241, 81st Cong., 2d Sess. 4 (1950).[14] According to the Senate minority leader, "You can't hardly separate homosexuals from subversives," including Communists. *Id.* at 30-38 (quotations linking homosexuality and Communism).

This stereotype has been the main justification for discriminatory family-law rules. Denying child visitation to a gay (biological) parent, an Ohio court explained that "given its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles." *Roberts*, 489 N.E.2d at 1070; *accord*, *S. v. S.*, 608 S.W.2d 64 (Ky. App. 1980); *Hall*, 95 Mich. App. at 615.

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[13] This reasoning underwrote discrimination against gay schoolteachers. Suzanne E. Eckes & Martha M. McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 Am. Educ. Res. J. 530, 531-33 (2008).

[14] *See also* Johnson, *Lavender Scare*, 101-18 (account of the committee's deliberations).

The same idea is expressed on the face of Michigan's 1996 statute and 2004 constitutional amendment, both purporting to protect society "and its children" against selfish gay people's assertion of basic civil rights. As summarized by the legislature, the 2004 campaign relied on precisely this argument: "Efforts to alter traditional marriage are driven by the selfish needs of individuals, not the needs of children." [Michigan] House Fiscal Agency, *Legislative Analysis: Prohibit Same-Sex Marriages and Similar Unions* 4 (Oct. 15, 2004).

This stereotype not only sustained anti-homosexual class legislation, and its recent updates, but once persuaded this Court to endorse this regime. When the Court upheld "homosexual sodomy" laws in *Bowers v. Hardwick*, 486 U.S. 186 (1986), the fifth vote came from Justice Lewis Powell. Although he was troubled by mandatory prison terms for consensual activities harming no one, Justice Powell was not able to overcome his deeply held views that the *constitutional* privacy right only protected "families," *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Powell, J., for a plurality) (protecting, as "family," a grandmother rearing her grandchildren).

As this Court observed when it overruled *Bowers*, Justice Powell and his colleagues "misapprehended the liberty claim" made by gay people who wanted the choice to enter into personal relationships, including those whose bond is "enduring." *Lawrence*, 539 U.S. at 566-67. In the wake of *Lawrence*, states started to recognize lesbian and gay marriages. By the time this Court decided *Windsor*, more than 100,000 lesbian and gay couples were legally

married, with almost a third raising children within their marital households. Gary J. Gates & Abigail M. Cooke, Williams Inst., *United States Census Snapshot: 2010* (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

Put simply, the Respondent-States have created a broad class-based regime denigrating and denying fundamental rights and benefits to an unpopular minority. As in *Loving*, the underlying stereotype is linked to sexuality and procreation; and as in *Loving*, the stereotype has been most deeply expressed in the form of marriage exclusion.

The Respondent-States' justifications have one odd feature that was absent in *Loving*. Not only do Kentucky, Michigan, Ohio, and Tennessee exclude gay couples from most of the states' family law—and not only does their main justification fail to address the connection between the needs of the excluded class and their children—but these states invoke the problems posed by *straight* couples as a reason to deny fundamental rights to *gay* couples. "How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be 'channeled' into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry." *DeBoer*, 772 F.3d at 422 (Daughtery, J., dissenting); *accord*, *Baskin*, 766 F.3d at 662 (Posner, J.).

Penalizing a minority for problems created by the majority is not only unfair scapegoating, but also implicates the core goals of the Equal Protection

Clause. "[L]egal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633). Moreover,

> there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring); *accord*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

The distinctions that the laws at issue here draw are nothing if not an example of the unjustified picking and choosing between different classes of people regarding certain legislative impositions.

CONCLUSION

Does the Fourteenth Amendment *require* states to issue marriage licenses to same-sex couples? Of course not. The Amendment doesn't say a word about marriage licenses. Or driving licenses. Or liquor licenses, business permits, corporate status, public schools, libraries, buses, or universities.

Indeed, the Fourteenth Amendment *requires* almost nothing affirmative from the states. The only benefits states must grant are the privileges or immunities of citizenship, the due process of law before depriving anyone of life, liberty, or property, and the equal protection of the laws.

In other words, the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples only if they give them to everyone else.

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